86-266

Supreme Court, U.S.
FILED
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CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUISIANA SCHOOL OF PROFESSIONS, INC.
Petitioner,
VS.
WILLIAM BENNETT, ET AL
Respondent,

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Counsel for petitioner

QUESTIONS PRESENTED

1. Whether or not the Appellate Court was correct in its findings that petitioner was afforded procedural due process of law under the Fifth and Fourteenth Amendment of the United States Constitution prior to the withdrawal of its accreditation.

2. Whether or not the Appellate Court was correct in its affirmation that respondent, WILLIAM BENNETT, had compelled compliance by the NATIONAL ASSOCIATION FOR TRADE AND TECHNICAL SCHOOLS, with the provisions of 34C.F.F. § 603.6 et seq.

PARTIES

LOUISIANA SCHOOL OF PROFESSIONS, INC., (no parent companies, affiliates or subsidiaries) plaintiff-petitioner, VERSUS WILLIAM BENNETT, SECRETARY OF THE U.S. DEPARTMENT OF EDUCATION and NATIONAL ASSOCIATION FOR TRADE AND TECHNICAL SHCOOLS, defendant-respondent.

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PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is not reported.

The memoranda opinion of the District Court (App.B) is not reported.

JURISDICTION

Petitioner's request for the issuance of a preliminary injunction was denied by the Western District of Louisiana (Shreveport Division) on May 17, 1986. The Judgment of the Court of Appeal's was entered May 28,1986. This Court has jurisdiction under 28 U.S.C.A. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Fourteenth Amendment, 34 C.F.R. 603, et seq., 42 U.S.C.A.¶¶2753 and 2754, 5 U.S.C.A. ¶702, and 28 U.S.C.¶1254 (1) 20 U.S.C.¶821, U.S.Sup. Ct. Rule 17 (1) (c), 28 U.S.C.

STATEMENT OF THE CASE

On February 13, 1986, petitioner, LOUISIANA SCHOOL OF PROFESSIONS, INC., (hereinafter referred to simply as LSP), a business school located in Caddo Parish, Louisiana, filed a complaint in the U. S. District Court for the Western District of Louisiana against the NATIONAL ASSOCIATION FOR TRADE AND TECHNICAL SCHOOLS, (hereinafter referred to simply as NATTS) and WILLIAM BENNETT, the Secretary of the Department of Education, alleging *inter alia* a violation of the rights secured to it by the terms of the Fifth and Fourteenth Amendments to the Constitution of the United States, 34 C.F.R., Section 603, et seq., 20 U.S.CA.¶821, et seq., 42 U.S.C.¶2753, et seq., Sections 1981 and 1983, and 5 U.S.C., Section 702.

In connection with the foregoing, petitioner sought a declaration from the District Court that it was entitled to a due process hearing prior to the withdrawal of its accreditation by "NATTS", and a preliminary injunction directing the Secretary of Education to resume its funding of petitioner's educational programs which was terminated when "LSP" lost its accreditation.

On February 27, 1986, the District Court issued a temporary restraining order enjoining respondents from taking any actions to recover funds received by LSP after March 20, 1985. The hearing on LSP's request for a preliminary injunction was fixed for March 14, 1986.

On March 17, 1986, the District Court in a written opinion denied petitioner's request for the issuance of a preliminary injunction, whereupon an Appeal was lodged with the Fifth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's denial of a preliminary injunction ruling that there was no violation of due process.

We seek review of the affirmance of the judgment finding no violation of due process.

ARGUMENT

1. The Court of Appeal's judgment is an affirmation of a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution. Respondent, "NATTS" denied petitioner due process when it withdrew petitioner's accreditation without notification of charges or an opportunity to be heard.

Although the Courts have countenanced post deprivation hearings for example, *Parratt v. Taylor. 450 U.S.* 527 101 § Ct. 1908, 68 L. Ed. 2d 420 (1981), the Courts have nevertheless steadfastly maintained that the post deprivation hearing must be meaningful and there must

be extraordinary circumstances justifying postponing notice and a prior opportunity to be heard. See *Breathe vs. Crondich,* 729 F.2d 1006 (5th Cir. 1984); and *Thibodeaux v. Bordelon,* 740 F 2d 329 (1984). Also see *Doe v. United States Department of Justice,* 753 F.2d 1092 (1985). The record will show this case involves no such extraordinary circumstances.

2. The Secretary of Education's position is that procedural due process under 34 C.F.R. (603 et seq) embraces both a hearing before the withdrawal of accreditation and a hearing at the appellate level. The Court of Appeals decision is not in accord with the Secretary's position. Furthermore, little if any attention was given to the record in regard to petitioner's witnesses testimony with respect to the lack of a meaningful hearing at the appeals level. Respondent, "NATTS," refused to consider any evidence extraneous to the record transmitted. Considering the fact that petitioner never received a hearing nor told that its accreditation was in jeopardy, the Appeal's Panel refusal constituted a blatent deprivation of properly without due process of law.

3. Secretary, WILLIAM BENNETT, was obliged to process the complaint of petitioner against NATTS filed in March, 1985, and implement 34 C.F.R. 603 et seq., by requiring respondent, NATTS, to afford petitioner a due process hearing prior to the withdrawal of its accreditation. (See *Legal Aide Society of Alameda V. Bennon,* 608 F.2d 1319 (1979).

4. The judgment by the Fifth Circuit Court of Appeals denying petitioner's preliminary injunction is under U. S. Sup. Ct. Rule 17 (1) (c) 28 U.S.C.A., a decision on an important question of federal law which has not been but should be settled by this court.

Petitioner, LOUISIANA SCHOOL OF PROFESSIONS, INC., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered May 28, 1986, affirming the denial of a preliminary injunction under the Fifth and Fourteenth Amendments and 34 C.F.R. §603.6 (b) (3), and that on hearing, the judgment be reversed.

Respectfully Submitted,
Original Signed By
ATTY. ROBERT E. PIPER, JR.

ROBERT E. PIPER, JR.
Attorney and Counsellor at Law
P. O. Box 69 - 624 Pierre Avenue
Shreveport, Louisiana 71161
(318) 226-0826

Counsel for Petitioner

CERTIFICATE

I HEREBY CERTIFY that three copies of Appellant's Petition for Writ of Certiorari were served upon the adverse party by certified mail this 28 day of AUG 1986.

Original Signed By
ATTY. ROBERT E. PIPER, JR.

ROBERT E. PIPER, JR.

APPENNDIX A

LOUISIANA SCHOOL OF PROFESSIONS

vs.

WILLIAM BENNETT,

ET AL Civil Action No. 86-0328

(W. D.LA March 17, 1986)

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

LOUISIANA SCHOOL OF PROFES-
SIONS, INC.
versus
WILLIAM BENNETT et al

CIVIL ACTION NO. 86-0328

MEMORANDUM RULING

I INTRODUCTION

A hearing was held on March 14, 1986, on plaintiff's motion for preliminary injunction. On February 27, 1986, this court issued a TRO solely to maintain the status quo between the parties. The issues now moves to a higher degree of specificity.

In order to secure a preliminary injuction, plaintiff has the burden of proving four elements: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest." *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F 2d. 464, 471 (5th Cir. 1985).

There is little doubt that plaintiff will satisfy requirements (2) and (4). See *Parsons College v. North Central Association of Colleges and Secondary Schools*, 271 F.Supp.65,69(N.D.Ill.1967). The primary issue to be examined on this motion for preliminary injunction concerns the likelihood of success on the merits.

II FACTS:

Louisiana School of Professions, Inc. ("LSP") was first accredited in 1978 by the National Association of Trade and Technical Schools ("NATTS"). LSP sought to have new courses accredited in 1981. As the first step in this process, LSP submitted a Self-Evaluation Report ("SER"). (Defense Exhibits 1 and 2, hereinafter "D-(Exhibit Number"). As the next step in the evaluation process. LSP received notice of a team visit, the

purpose of which was to inspect the school and verify the SER. The announcement of the Team Visit is dated September 29, 1982 (D-3). A team report dated December 15, 1982 was prepared and delivered to LSP (D-4). The Team Report noted that there were "fourteen items of concern (which) are felt to be of such a nature as to warrant immediate attention and (which) may be of primary concern to the Commission." NATTS' accreditation procedure called for the School to make a response to the Team Report. On April 22, 1983 NATTS sent LSP a letter advising it that the decision on LSP's application would be deferred (D-5). This deferral was pending submission by LSP of a progress report and further information on areas of concern which were outlined in a separate attachment to the letter. The Progress Report was submitted to NATTS by LSP on June 6, 1983 D-6). The Accrediting Commission of NATTS again deferred action on LSP's application for re-accreditation. LSP submitted another SER (D-8).

On October 19, 1983, LSP filed a petition for Chapter 11 Bankruptcy reorganization with the United States Bankruptcy Court for the Western District of Louisiana. By letter dated October 21, 1983, the School informed NATTS of its Chapter 11 status (D-9). The Accrediting Commission for NATTS requested additional information by letter dated November 28, 1983 (D-10). The School responded on December 9, 1983 (D-11). On February 2, 1984, LSP notified NATTS that it was changing locations. This change allowed LSP to move to alarger location at a more favorable rental rate.

On February 9, 1984, the Accrediting Commission sent LSP a letter informing it that another review team would be scheduled to visit the School (D-13). The letter

specifically outlines the Commission's concerns about the School's financial condition. Accordingly, LSP filed another SER on March 9, 1984 (D-14). By letter dated March 12, 1984, the Accrediting Commission informed LSP of the scheduled visit of a review team and of the members of that team (D-15). The Team Report dated August 3, 1984 lists twenty-two areas of concern and three areas where additional information was needed (D-18). The Team Report focused, *inter alia*, on the financial status of the School. On August 24, 1984, LSP responded to the report (D-19, 20). The Accrediting Commission again deferred action on the application for re-accreditation by letter dated November 20, 1984 (D-21). This letter also outlined areas of concern including concerns about the financial soundness of LSP. The Commission asked LSP to supply a further progress report which it did on December 7, 1984 (D-22).

The Accrediting Commission met on January 10, 1985, and at that meeting voted to withdraw accreditation from LSP. LSP was notified by letter dated January 31, 1985 (D-23). As grounds for withdrawal, the letter made the following notations:

1. The school failed to demonstrate that the financial structure of the school is sound with resources sufficient for the continued proper operation, support and discharge of obligations to students.

2. The school failed to demonstrate that management is properly qualified for their particular roles at the school, and have the capabilities to administer an educational program.

The notification of withdrawal also included notification of LSP's appeal rights and right for reapplication.

On February 4,1985, LSP informed NATTS by letter of its intent to appeal (D-24). On March 4, 1985,LSP submitted its formal appeal along with supporting documents (D-25,27). NATTS also received information from LSP's attorney (D-26). A certified public accountant and Dr. Ernest Lampkins, the director of LSP, attended the Appeals Panel hearing held on March 15, 1985. LSP was informed by letter dated March 20, 1985 that the Appeals Panel had decided to uphold the Commission's decision to withdraw accreditation (D-28).

At this time, the United States Department of Education was first informed of the withdrawal of LSP's accreditation (D-29). After receiving notice of withdrawal of accreditation, Dr. Lampkins went to Washington, D.C. and met with Dr. Morris Brown and John Uchima of the United States Department of Education. At this meeting, Dr. Lampkins informed the officials that he felt that the sole basis for the withdrawal of accreditation was the school's failure to file timely financial reports. Dr. Lampkins also stated that he would file a complaint with the Secretary. He did so on March 31, 1985. Uchima stated in his deposition that he told Dr. Lampkins that even if a complaint were filed, funding would have to be terminated as of the date of the withdrawal of accreditation (D-8,9). Leslie Ross, chief of the Agency Evaluation Branch (the division of the Department of Education in charge of recognition of accrediting associations) stated that Dr. Lampkins' complaint was forwarded to NATTS and that NATTS had responded (albeit not in a completely responsive manner) (D-12,13). No further action was taken because information was received that a legal action was pending. Id. at 15.

The loss of accreditation meant that LSP was no longer statutorily entitled to receive federal funding under the Pell Grant Supplemental Educational Opportunity Grant and the National Direct Student Loan programs. However, after March 20,1985, the LSP continued to receive Funds. The Department of Education contends that approximately $170,000 was disbursed to LSP until the Department realized in October 1985 that LSP was no longer eligible. On October 15, 1985, the Department of Education sent LSP a notice informing it that due to its loss of accreditation it was no longer eligible for federal funds and that an audit would be conducted to recover funds disbursed after March 20, 1985 (Government Exhibit 2). On October 30, 1985, LSP filed an adversary proceeding in Bankruptcy Court to prevent any administrative action to recover funds. On November 3, 1985, Judge Smallenberger issued a temporary restraining order which enjoined the Department of Education from terminating LSP's eligibility for federal funds. In compliance with the Bankruptcy Court's Order, the Department of Education sent two letters to LSP which indicated that the Department had rescinded its actions to terminate LSP's eligibility (G-3,4).

LSP then voluntarily dismissed its adversary proceeding, and Judge Smallenberger, on December 5, 1985, issued an Order vacating the prior TRO. Once the TRO was lifted by the Bankruptcy Court, the Department of Education sent another notice to LSP informing the School that it was not eligible for Federal funding and that actions would be taken to recover funds disbursed since March 20, 1985 (G-5).

On February 14, 1986, LSP filed the instant action in this court and sought a TRO. On February 18, 1986, a hearing was held on LSP's Application for

TRO. On February 27, 1986, a TRO was issued which enjoined the Department of Education from recovering any funds distributed to LSP after March 20, 1985. The TRO did not grant any other injuctive relief to LSP. The sole purpose of the TRO was to maintain the status quo until this hearing.

III THE ACCREDITATION PROCESS:

The accreditation of a trade school such as LSP involves a complex interplay of statutes, regulations, and accrediting agency rules. Most of LSP's students receive federal financial assistance. Accreditation is thus crucial for LSP because unless it is "accredited... by a nationally recognized accrediting agency or association listed by the Secretary (of Education)..." it cannot qualify for federal funds. 20 U.S.C. § §1085 (a) (c) (student Loans). 1088 (b) (student assistance programs). 1141 (a) general provisions). The Secretary of Education is authorized to publish "a list of nationally recognized accrediting agencies or associations . . . which he determines to be reliable authority as to the quality of education or training afforded." 20 U.S.C. § § 1085(c), 1088(b), 1141. The Secretary has published "recognition Procedures for National Accrediting Bodies and State Agencies." 34 C.F.R. § § 603.1-603.6 (1985). These regulations establish a long list of criteria which the accrediting agency must meet in order to receive recognition by the Secretary. 34 C.F.R. § 603.6 Once an agency is recognized, it "will be reevaluated by the Secretary at his discretion, but at least once every four years." 34 C.F.R. §603.5(a). NATTS has been recognized by the Secretary (and his predecessors) since 1967. NATTS appears on the list of nationally recognized accrediting agencies published on October

2,1985. The criteria which govern the Accrediting Commission of NATTS and its operations, responsibilities, reliability and autonomy are set out in 34 C.F.R. 603.6

In his deposition, Bernard Ehrlich, counsel for NATTS, explained the procedures used by that association in reviewing accreditation applications. NATTS is an association made up of trade and technical schools accredited by its independent Accrediting Commission (Deposition at 5-6). The Accrediting Commission is independent of NATTS, which cannot review the Commissions' decisions. *Id.* The federal mania for acronyms designates the accrediting segment of NATTS as AC-NATTS, it is this Accrediting Commission which has been recognized by the Secretary. The Commission is composed of "5 [members] from the school field and four outside people" (Deposition at 44). These members are chosen by the Board of Directors of NATTS after receipt of nominations. *Id.* The Board is selected by the members of the Association after nomination. and vote at a convention (Deposition at 45). An applicant first files a SER. This is followed by a Team Visit. The Team Visit is announced in advance, and the school has the right to strike any member of the visiting team (Deposition at 51). A Team Report is then filed. The school has the opportunity to respond to the team report. The Accrediting Commission does not see any document until the school has had an opportunity to respond (Deposition at 25). Once the school has responded, the record (SER. Team Report and school response) goes to the Accrediting Commission. Each application is considered by a sub-committee of The Commission (a group of four commissioners with the chairman of commissioners acting as "swingman" on each sub-committee). If the Commission has concerns other than, or in addition to, those of the Review Team,

then a letter is sent to the school and all action on the application is deferred. The school has an opportunity to respond to the Commission's concerns. (LSP's application for re-accreditation was deferred three times as a result of such Commission action.) The Commission meets quarterly, and if the sub-committee decides upon adverse action against any school, then the application is taken up by the full Commission. Mr. Ehrlich conceded that the Commission has the right to have a school representative present at its meeting, but to his knowledge, the Commission has never done so. *Id.* If the Commission votes to withdraw accreditation, the school (but not the Department of Education) is notified. The School then has the right to appeal the decision to the Appeals Panel. The Appeals Panel (of three persons who have served on visiting teams) is selected by the Commission. A list of five names is submitted to the school which has the right to strike any member (Deposition at 47-48).. Although the NATTS provisions state that the Appeals Panel is limited to the records before the Commission, schools are usually allowed to file whatever supporting documents they desire (Deposition at 33-34). In this case, LSP filed documents in support of its appeal. At the Appeals Panel, the school has the right to be present and represented by counsel. Also, a transcript may be requested. At its appeals hearing, LSP was accompanied by a certified public accountant. If the Appeals Panel upholds the determination by the Commission, then the withdrawal of accreditation is final and the Department of Education is informed. The school may apply for waiver of the nine-month waiting period for reapplication. LSP did apply for this waiver, and it was denied.

IV LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff appears to make three separate

arguments in support of its application for a preliminary injunction: that the standards used by NATTS were subjective and vague; that NATTS lacks black representation on its Accrediting Commission; and that its due process rights were violated. Before turning to the merits of these contentions, it should be noted that plaintiff in its complaint is relying on a number of constitutional and statutory provisions including the Fourteenth Amendment to the Constitution and 42 U.S.C. § § 1981 and 1983. These provisions appear to be totally inapposite to this suit. The Fourteenth Ammendment, as well as the provisions in Title 42 of the United States Code, are all directed toward state action. There is no state action in this case. Plaintiff's complaint is better grounded in its allegations under the Fifth Amendment to the Constitution, which is directed toward limiting the federal government's power and 5 U.S.C. § 702 (providing for judicial review for any person aggrieved by an agency action).

Turning now to the substance of plaintiff's claim, the contention that NATTS employs subjective and vague standards will be addressed first. Judicial intrusion into the nuts and bolts of the educational system in the United States is not well received. Courts are not super legislatures, nor are they super school boards or super accrediting agencies. One court has noted that a "court's" review of the decision of an accrediting association is limited to a determination that the Association's actions were not arbitrary or unreasonable . . . and that the decision was supported by substantial evidence and reasonably related to legitimate professional purposes of the Association." *Rockland Institute v. Association of Independent Colleges and Schools*, 412 F. Supp. 1015, 1016, (C.D. Cal. 1976). In a case cited by the plaintiff, the court noted

that "the courts are traditionally even more hesitant to intervene [into questions of the adequacy of reasons given for withdrawing accreditation]. The public benefits of accreditation, dispensing information and exposing misrepresentation, would not be enhanced by judicial intrusion." *Parsons College*, 271 F. Supp. at 74. Given the length of time in which the accrediting association considered LSP's application and the amount of information exchanged between the Commission and the School, this court cannot state that it is more probable than not that plantiff will succeed on an arbitrary or unreasonable standard of review.

Furthermore, such a complaint about the standards employed by NATTS would not appear to be sufficient legal grounds to support an injunction against the Secretary of Education. In establishing a Department of Education, Congress provided that "no provision of a program administered by the Secretary. . . shall be construed to authorize the Secretary... to exercise any direction, supervision, or control... over any accrediting agency or association . . . except to the extent authorized by law." 20 U.S.C. § 3403(b). The role of the Secretary is a very limited one. He simply determines that the agency is a "reliable authority as to the quality of education or training afforded." *See, e.g.*, 20 U.S.C. § 1085(c). Furthermore, under the doctrine announced in *Warth v. Seldin*, plaintiff would appear to lack standing in this matter. Under the doctrine of *Warth*, if the federal relief sought would not remedy the harm of which plaintiff complains, then there is no standing. Even if the NATTS standards violate the criteria established by the Secretary of Education, such violation would simply mean that the Secretary should not recognize NATTS as an accrediting agency. It would not mean that LSP should be deemed accredited. In *Simon v. Eastern*

Kentucky Welfare Rights Organization, 96 S. Ct. 1917 (1976), the Supreme Court held that "when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation." Id at 1924 . The Simon court specifically held that the fact that the plaintiffs were suing under 5 U.S.C. § 702 (as does LSP in this case) did not alter the fact that the requisite standing must be shown. *Id.* at 1924-25. In Simon, the Court rejected plaintiffs' claim to standing on the grounds that the impact of the requested remedy on plaintiffs' harm were speculative. In the instant case, there is no speculation involved at all. Even if the Secretary were to decide favorably on LSP's complaint, the sole result of this action would be to remove the Secretary's recognition of NATTS as an accrediting agency. Removal of this recognition of NATTS would not make LSP an accredited institution. Unless LSP is accredited, it cannot receive federal funds. Thus, there is little likelihood for success on the merits against the Secretary of Education since LSP lacks the requisite standing to sue the Secretary.

LSP's second contention is that NATTS lacks black representation. Initially, it must be noted that LSP, and any other minority schools, have a voice in the selection of the Board of Directors and through the Board of Directors have a voice in the selection of the Accrediting Commission. Second, plaintiff has cited no source of authority in support for its contention that it has a right to expect black representation on the NATTS Board. Third, LSP has made no contention and has submitted no documents in support of a disparate

treatment or disparate impact theory of the case. Without a showing that the lack of black representation on the Board has resulted in unequal treatment between "white" schools and minority-owned/attended schools, LSP simply does not have a legal claim. *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973).

Finally, LSP makes very broad allegations of due process violations. LSP contends that it did not receive adequate notice of the charges, that it had no inkling that its accreditation was in danger, that it was not allowed to present additional evidence on appeal, and that other avenues of procedure should have been used (a rule to show cause order could have been issued with a full legal-type hearing, or LSP could have been accredited with certain stipulations). The initial problem faced in assessing plaintiff's due process claims is to determine what standard to apply. Should NATTS be considered a quasi-governmental body in which event the standard applicable to all government relations should apply? Or is NATTS to be considered a private association in which a greatly reduced standard is employed? Resolution of this thorny issue can probably be avoided by mere reliance on the facts of this case and, in any event, may be more appropriate for resolution on a final hearing on the merits rather than on an application for a preliminary injunction.

Rudimentary due process requires notice and an opportunity to be heard. *Perry v. Sindermann*, 408 U.S. 593 (1972). The Supreme Court has stated time and time again that procedural due process is a very flexible

concept. *Id.* In this case, all of the procedures mandated by 34 C.F.R. § 603.6(b)(3) have been met. Although plaintiff was not invited to the Accrediting Commission's meeting, there was not a single piece of paper before that Commission to which plaintiff was not afforded an opportunity to respond. Furthermore, no one, apart from LSP, was notified of the adverse action until the appeals process had been completed. LSP was afforded an appeal and was allowed to file papers in support of its appeal and was allowed to supplement the record on appeal (Ehrlich deposition at 33-34 and D-27). The record as a whole reflects that for over 15 months LSP and NATTS were corresponding concerning the concerns of the Accrediting Commission. (Action was deferred by the Accrediting Commission three times, and each time specific reasons for the deferral were delineated, including notice that the Commission was concerned with LSP's financial status. In this case, LSP was afforded notice of the Commission's problems with its application and was afforded a written opportunity to be heard on numerous occasions. Viewed in this light, it does not appear that plaintiff is likely to succeed on the merits. Due process requires notice and an opportunity to be heard; it does not require error-free decision-making. *McCrae v. Hankins*, 720 F. 2d 863 (5th Cir. 1983).

In this case, LSP was informed prior to the January 1985 Commission meeting that the Commission was concerned with the School's financial status (D-18,21). The School had an opportunity to respond to this concern by making a supplemental report. LSP did so (D-22). LSP was informed of the Commission's adverse decision and had an opportunity to appeal, to appear with counsel at the appellate hearing, and to refute the grounds of the Commission's decision at the Appeals

Panel. LSP appeared with a CPA at the Appeals Panel and submitted documents in support of its contentions. Considering the totality of circumstances, this court is not convinced that LSP has demonstrated a likelihood of success on its due process claim against NATTS. LSP received notice of the reasons why the Commission decided to withdraw its accreditation and had an opportunity to respond in person before the Appeals Panel. Because LSP had a hearing with the Appeals Panel and had an opportunity to respond to every document which went before the Commission, the court cannot conclude that LSP's due process rights were violated. *Phillips v. Vandygriff*, 711 F.2d 1217, 1222 (5th Cir. 1983), *cert. denied*, 105 S. Ct. 94 (1984). No loss of accreditation occurred prior to the confirmation of the withdrawal by the Appeals Panel on March 20, 1986. LSP was not entitled to notice and a hearing *prior* to the announcement of the Commision's decision. *Franceski v. Plaquemines Parish School Board*, 772 F.2d 197 (5th Circ. 1985).

There does not appear to be any merit to plaintiff's contention that it is entitled to a show cause hearing. As explained by Mr. Ehrlich, the show cause procedure is only used in very grave emergency situations. In this case, the parties had been corresponding back and forth over a 15-month period. Further, there is no constitutional violation when an institution fails to follow its own rules. *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1230 (5th Cir. 1985).

Finally, plaintiff was not entitled to a separate hearing from the Secretary of Education before the withdrawal of its eligibility for federal funds. *See Beth Rochel Seminary v. Bennett*, 624 F. Supp. 911, 918 (D. D.C. 1985):

The determination that plaintiff failed to satisfy the definition of the term "institution of higher education" is not a "termination" requiring a "hearing on the record" as called for in section 1094 (b)(1)(D); see also 34 C.F.R. § 668.71(c)(1) (no right to notice and hearing for failure to meet eligibility requirements of section 1141. Nevertheless, Beth Rochel officials did meet with ED officials who entertained several appeals concerning Beth Rochel's loss of eligibility and liability. *Supra* at 915.

Thus, the plaintiff has demonstrated little likelihood of success against the Secretary on a due process theory.

V *CONCLUSION:*

At the hearing, the court held in abeyance its ruling on whether to admit documents from another civil proceeding involving NATTS. Research has demonstrated that the court may take judicial notice of other court decisions in certain circumstances. *See, e.g., U.S. v. Garacia-Gonzalez*, 702 F.2d 520 (5th Circ. 1983) This court has reviewed the requested documents and does not find them dispositive fo the instant case. As noted above, plaintiff has not demonstrated a likelihood of success on the merits of this case. Whether another plaintiff has demonstrated a likelihood of success on the merits of another case does not alter the conclusions reached regarding LSP, NATTS and the Secretary.

Accordingly,. plaintiffs request for preliminary injunction is hereby DENIED.

An Order consistent with this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 17th day of March, 1986.

TOM STAGG, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

LOUISIANA SCHOOL OF PROFESSIONS, INC.

versus

CIVIL ACTION NO. 86-0328

WILLIAM BENNETT et al

ORDER

For the reasons enumerated in the foregoing Memorandum Ruling,

IT IS ORDERED that the request of plaintiff, Louisiana School of Professions, Inc., for preliminary injunction is hereby DENIED.

DATED AND SIGNED at Shreveport, Louisiana, this 17th day of March, 1986.

TOM STAGG, CHIEF JUDGE

APPENDIX B
LOUISIANA SCHOOL OF PROFESSIONS
V.
WILLIAMS BENNETT, ET AL.
No. 86-4185 (5th Cir., May 28, 1986)
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-4185

LOUISIANA SCHOOL OF PROFESSIONS, INC.
Plaintiff-Appellant,
Versus
WILLIAM BENNETT, SECRETARY OF THE DEPARTMENT OF EDUCATION, ET, AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana

May 28, 1986

Before GEE and HIGGINBOTHAM, Circuit Judges, and Harvey*, District Judge.

GEE, Circuit Judge:**

Today's case involves an appeal from the district court's denial of a preliminary injunction. Arguing that the withdrawal of accreditation violates its fifth amendment rigth of due process, the Louisiana School of Professions, Inc., ("LSP") seeks

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* District Judge of the Eastern District of Michigan sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of las imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the cosurt has determined that this opinion should not be published.

to enjoin the Secretary of Education from reclaiming any funds received after the date its accreditation was withdrawn. Because no due process violation occurred, we affirm the district court's ruling.

The National Association for Trade and Technical Schools ("NATTS") is an agency authorized by the Secretary of Education to accredit trade schools meeting certain standard and qualifications. Accreditation is necessary before a school may receive federal funds. 34 C.F.R. § 603.1 (1985). NATTS's board of directors appoints an Accrediting Commission ("Commission") specifically responsible for making accreditation decisions after reviewing periodic evaluations of the schools.

The facts of this case are mostly undisputed. In 1984, being duly accredited, LSP was receiving federal assistance. Because it sought renewal of its accreditation, the Commission commenced its review process -- one that requires the applicant school to file a self evaluation report. There soon follows a "team visit" -- an inspection of the school -- resulting in a report to the Commission. The school is provided the opportunity to respond to any such report. These steps completed, the Commission gleaned troubling data about LSP's financial situation. Following standard procedure, it notified LSP of its concerns and deferred action on LSP's application for renewal. In fact, it deferred its decision three times before ruling at last on January 31, 1985, to withdraw accreditation. Reasons given for the ruling were the school's financial problems and incompetent management.

This does not end the matter, however, because standard procedure accorded LSP the opportunity to appeal the decision. Upon deciding to withdraw accreditation, the Commission notified LSP, informing it of this right. Dr. Ernest Lampkins, the president of LSP, later testified at trial that the Commission both instructed him how to appeal and informed him of the right to appear before the Appeals Panel accompanied by counsel. Although stated official policy restricts the evidence that the Panel may consider to the records which the Commission has assembled, in practice it appears that a school may file any documents that it wishes supporting its contentions. LSP,in fact, filed such documents and it had the opportunity to be heard before the Panel. In addition, its accountant accompanied school officials to help rebut adverse information. LSP, however, was unable to convince the Panel that reversal of the Commission's decision was called for. On March 20, 1985 -- the date the Panel entered its decision to affirm --LSP was removed from NATTS's list of accredited schools.

Almost a year later, LSP brought this suit for injunctive relief against the Secretary of Education and NATTS. The court issued a temporary restraining order preventing the defendants "from any actions to recover funds received by Louisiana School of Professions, Inc. after March 20, 1985 to the present date." At the preliminary injunction hearing in mid-March, the court denied LSP's request for a preliminary injunction because it "has not demonstrated a likelihood of success on the merits of this case." LSP now appeals this ruling.

We may hear an interlocutory appeal from the denial of a preliminary injunction. 28 U.S.C. § 1292(a)(1). To obtain a preliminary injunction, the movant must prove four things:

(1) a substantial likelihood exists that he will prevail on the merits;
(2) a substantial likelihood exists that he will suffer irreparable injury if the injunction is denied;
(3) the threatened injury to him outweighs the threatened harm the injunction may inflict upon the defendant, and
(4) the preliminary injunction would not harm the public interest.

Canal Authority v. Gallaway, 489 F.2d 567, 572 (5th Cir. 1974). We may review a court's denial of a preliminary injunction for an abuse of discretion only. *E.g., Exhibitors Poster Exchance, Inc. v. National Screen Service Corp.*, 441 F.2d 560, 561 (5th Cir. 1971). In this case, we conclude that no abuse occurred; to the contrary, we agree with the district court's conclusion that LSP is unlikely to be able to prevail on the merits.

On appeal, LSP alleges that the withdrawal of accreditation violated its right to procedural due process. Appellees do not dispute that a property interest is involved ; rather, battle is joined over what process is due. As we have before held, in such circumstances as these due process is satisfield when notice and the opportunity to be heard are provided before the de-

privation occurs. *See, e.g., Franceski v. Plaquemines Parish School Board*,772 F 2d. 197,199 (5th Cir. 1985).

The Commission provided these before it withdrew accreditation on March 20, 1985. Throughout the process of review, LSP knew exactly where it stood. Extensive correspondence occurred for over fifteen months between LSP and NATTS; each time the Commission deferred action on LSP's application, it spelled out its reasons to LSP in great detail. When it denied renewal on January 30, 1985, it again informed LSP. More important, the Commission provided LSP all information needed to appeal the decision. LSP knew both of the procedures involved in taking the appeal and its rights before the Appeals Panel. It took advantage of those rights, moreover, filing documents in support of its contentions and bringing an accountant before the Panel to help explain its financial situation. In no way did the Commission violate LSP's constitutional rights. For a like conclusion in a similar case, *see Marlboro Corp. v. Association of Independent Colleges & Schools, Inc.*, 556 F 2d 78 (1st Cir. 1977)

We also agree with the district court's conclusion that the Commission's procedures fully complied with the requirements of 34 C.F.R. § 603.6 (b)(3). Because these conclusions fully resolve the case, we feel it unnecessary to consider the other arguments advanced by the Secretary of Education. No abuse of discretion occurred; the district court's ruling is

AFFIRMED.